The Growth and Modifications of Private Civil Law.

INTRODUCTORY ADDRESS

—OF THE—

SESSION OF 1879–80.

—OF THE—

LAW DEPARTMENT

—OF THE—

University of Pennsylvania,

—BY—

HON. WILLIAM STRONG, LL.D.,

JUSTICE OF THE SUPREME COURT OF THE U. S.

PRINTED FOR THE CLASS.

PHILADELPHIA
A. L. FARRAND, STEAM-POWER PRINTER,
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CORRESPONDENCE.

PHILADELPHIA, *October* 3, 1879

DEAR SIR:

In accordance with a resolution adopted at a meeting of the students of the Law Department, University of Pennsylvania, held Thursday, October 2nd, the undersigned were appointed a committee, to solicit for publication, your address delivered on the 1st inst., from which was derived so much pleasure and instruction.

In discharging our agreeable duty, we feel impelled to remark, that we know we are but expressing the sentiments of the entire audience in making this request, and trust it may receive your favorable consideration.

Very respectfully and truly,

GEORGE S. PHILLER,
ALFRED G. CLAY,
EDW. G. MCCOLLIN,
HENRY M. HOYT, JR.,
F. L. WAYLAND,
JACOB SINGER,
WM. DULLES, JR., *Chairman.*

To the
Hon. WILLIAM STRONG, LL. D.

WASHINGTON, *October* 6, 1879.

GENTLEMEN:

In compliance with your request as made in your letter of the 3rd inst., I herewith send a copy of my address, made to the students of the University of Pennsylvania, placing it at your disposal.

With thanks for the kind manner in which your request has been made, I am, very respectfully and truly,

Yours, &c.,

W. STRONG.

WM. DULLES, JR.,
and others, Committee.

ADDRESS.

Gentlemen of the Law Department of the University:

In the endeavor to meet my engagement to address you, not the least embarrassment I have encountered has been the choice of a subject. Addresses on occasions similar to the present have been so numerous in recent years that almost every conceivable topic has been anticipated. Professional ethics have many times been presented for consideration. The dignity and usefulness of the law and of the legal profession—the relation of lawyers to the civil community and to the courts—their political tendencies and their agency in securing liberty—their moulding power over legislation—in a word, their active agency in promoting all the best interests of the civil community, have so often been discussed that little or nothing remains to be said. What then shall I propose for your consideration? Discussion of some legal question would be comparatively easy, but if it could be made interesting, you would all recognize its inappropriateness to the occasion. At the commencement of the university year, when young men are about to begin distinctive preparation for entrance upon the legal profession, something more general, something introductory, is demanded, as more useful as well as more fitting. Hence I do not propose to attempt any statement of the rules of municipal law upon any particular subject or any comprehensive exhibit of the needful qualifications of its professors, or of their claims to popular regard. My purpose is rather to

call attention to some phases of that great system of rules that constitutes what is known as the private municipal law, acknowledged in England and in this country, controlling and regulating the business and relations of every individual in the community.

We are accustomed to speak of it as a science, and we do so with strict propriety. Yet in some of its aspects it is unlike most other acknowledged sciences. In mathematics, in mental and moral philosophy, as well as in the natural sciences, there are axioms and rules that are fixed and unchangeable, founded in the nature of things. Our knowledge of them may increase—our deductions and reasonings from them may change, but they remain the same. This cannot be said of that system of municipal law which exists in England, or of that which is the rule of civil conduct in this country. I know it has been said that the fundamental principles of our law are unchangeable, and that its maxims have endured unaltered ever since the law of England had any systematic existence. The assertion is too broad. It must be confessed that the history of the law is a story of change, as well as of development. Doubtless the knowledge of any other science is progressive. It is ever a thing of growth. But the science remains the same. So it is true the principles of justice are enduring. They are and they have been the same through all ages. It is also true that the avowed object of municipal law is to promote and enforce justice between man and man in a state of civil society. It has no other aim. But law is not identical with justice. It proposes nothing more than rules for administering justice, and, like most other rules of human device, they have ever been found capable of improvement. And, as improvement involves change, it seems to be a just reason for congratulation and increased veneration for the law, that changes and improvements are to be found in its history —that it bears no resemblance to a stagnant lake, but is rather like a gently flowing river, widening and deepening as it flows onward ever toward the ocean of perfect justice.

These changes and improvements of the law have been so

gradual as generally to be almost imperceptible during their occurrence. Yet if any two periods not very remote from each other be contrasted, they will be found to have been exceedingly important. Not quite one hundred years ago Mr. Reeves, the author of the exceedingly interesting and instructive History of the Laws of England prior to the close of the reign of William and Mary, remarked as follows: "It has happened to the law, as to other productions of human invention, particularly those which are closely connected with the transactions of mankind, that a series of years has gradually wrought such changes as to render many parts of it obsolete, so that the jurisprudence of one age has become the object of mere historic remembrance in another. Of the numerous volumes that compose a lawyer's library, how many are consigned to oblivion by the revolutions in opinions and practice, and what a small part of those which are still in use is necessary for the purposes of common business! Notwithstanding, therefore, the multitude of books, the researches of a lawyer are confined to writers of a certain period. According to the present course of study," said he, "very few look further than Coke and Plowden. Upon the same scale of inquiry, the year-books are considered rather in the light of antiquities, and Granville, Bracton, and Fleta are no longer a part of the law."

These changes were affirmed of a period in which society made only slow advances; in which there was no large and general spread of intelligence; in which the common arts of life made comparatively little progress; when commerce was small, and manufacturers were almost unknown; when the masses of people were occupied in struggling against baronial oppression, or sunk in despairing inaction; when lawyers and statesmen were contending with the church and the crown; when business relations were simple and free from complication, and when private rights were considered of small importance. The world has made great advances since that period. Society has put on another aspect. In England, and in this country, the struggle over fundamental government

ideas has come to an end. The largest liberty consistent with social order is conceded, and private rights have risen into prominence in public consideration that they never had in any former age. Meanwhile, with advancing civilization, the transactions between man and man have become more numerous and complicated. Trade and commerce have immensely increased. The instruments by which they are conducted have been changed or greatly improved. New arts have been introduced, giving rise to new modes of conducting business operations, and many things that were formerly unattainable, even as luxuries, have become the necessities of common life. In a word, the ties that bind the community together are more numerous and more closely drawn than ever before. Men do not live as much to themselves. Their interests are more interwoven with the interests of all others. To regulate the enjoyment of private rights, multiplied and complicated by this new order of things, and to enforce the corresponding duties, additional rules have become indispensable, or, at least, changes and modifiactions of old ones, in order that the law may continue sufficient for the administration of justice, and the promotion of the general welfare.

It would be strange, therefore, if the law, as it now is, did not exhibit very marked changes when compared with the law of former generations—if it did not present evidences of growth, as well as of change, corresponding with the enlarged needs of society. It would be a just reproach to a system claiming to regulate the conduct and relations of the civil life of a great community if it remained the same from generation to generation, a fossil, incapable of accommodation to the growing necessities of the age.

There is no warrant for such a reproach. It has long been the boast of the civil law, as it was of the Roman, that it is eminently plastic, that it may be and is readily accommodated to the varying circumstances of the communities where it exists, and that in its administration a rule may always be found for enforcing justice between man and man, no matter how complicated or novel their relations may be.

The law of England and of this country is entitled to the same praise. I think, even more than the civil law, it has within itself the principle of growth. Certainly, if we look at its history, its boundaries have been immensely extended since Mr. Reeves wrote. It has acknowledged new rights, adopted and enforced new rules, modified and abandoned old ones, and, in fact, it has exhibited a vitality, and wrought out a development which could no more have been foreseen than could have been the stupendous advances in other sciences, or in the arts, which the present age has witnessed. The student and the professor of law is now called to a larger work than that which engaged the attention of his predecessors. He has fields to explore unknown to them. He has questions to examine which were not raised in former times. The books which a former generation studied will not meet all his necessities. While many principles, rules and maxims have come down to us unchanged from time immemorial, which must be thoroughly known, others have become obsolete, and new maxims and rules have appeared. That professional education that filled the need of the lawyers of the last century is insufficient now.

I have said these changes, and this development of our legal system, have been gradual; so gradual as frequently to have been almost imperceptible while they have taken place. It is fortunate that they have been thus made. But within the last century, that period in which the civilization of the world has made its greatest upward movement, they have been increasingly numerous alike in this country and in England. While it is true that the law relating to many subjects is the same as it was centuries ago, and while it is equally true that the professor of law must be familiar with it as it was in former ages, it is no less true that his studies are now principally in another direction. A lawyer's library is a very different thing from what it was an hundred years since. I do not refer now to the marvelous increase in the number of books that cover his shelves, nor to the increase of reports and digests, or elementary books, many of them worthless, nor to

the surprising accumulation of statutes, but to their character, and the subjects of which they treat. The old English law had reference principally to real estate. It was largely feudal in its origin, and the feudal system applied to land. Hence, writers upon the subject discussed principally tenures, modes of their creation and transfer, and the rights and duties attending or resulting from them. Personal rights, and those growing out of the ownership of personal property, received comparatively small attention. In fact, in olden times there was little personalty. What there was was regarded as almost beneath notice. But as trade developed and manufactures increased, when, in consequence thereof, personal property rose into greater relative importance, when business relations became more complicated, cases were constantly arising for which neither any statute, nor the customs of the realm furnished any rule, and, consequently, a necessity was forced upon the courts to frame new rules, generally in modification of old ones, or analogous to them, to effectuate justice. With every age this necessity has increased, and the new or modified rules thus adopted have found a place in reported decisions, and in elementary books. The law of real estate, though changed in some particulars, is now in substance very like what it was in the reign of William and Mary. But the law of personal property, the law of trade and commerce, and the law which regulates, asserts, and preserves those rights that grow out of the complicated relations of modern business and modern life, are almost new creations. Hence, the elementary works which engaged the attention of students preparatory to their entering the legal profession one hundred years ago, are not those in most common use. And as civilization has continued to advance with steady steps, the reports of judicial dicisions made in the last century, or even in the commencement of the present, are no longer the subject of that study which was devoted to them by the students and lawyers of that time. Who now pores night and day over Coke upon Littleton, or Littleton's Tenures? Who studies Plowden, or Raymond, or Croke, or Burrows? Who reads carefully Fearne on Remaind-

ers, or Saunders on Uses, or Sugden on Powers, or Preston on Estates, or William's Saunders, or Reeves' Domestic Relations, or Roper, or Pothier? I do not say that they should not be read and carefully studied. What I mean to assert is that modern changes of the law have diverted attention from the richest treasuries of the past. Even the earlier American reports, published in the first quarter of the present century, lie upon our shelves little used. How is this to be accounted for if it be not that the subjects which engross the attention of the modern lawyer are different from those with which our immediate predecessors at the bar, and the courts of the next preceding age, were occupied?

I do not mean to intimate, I say, that the old English reports and the earlier American, as well as some of the early elementary writers, are not of great continued value, worthy still of the best study. On the contrary, I think they are too much neglected. They are authoritative exponents of many principles and rules that have a present existence, more cautiously and discriminatingly enunciated than is common in these later times of haste and pressure; and they enable us to understand the origin and true meaning of more recent rules, which are developments or modifications of the principles they assert. But the questions considered and determined in most of those old reported cases, or discussed and restated in the text-books, are settled. They are no longer the subjects of controversy or debate, and the decisions are accepted as the law without further investigation. The questions that demand the attention of modern courts are, in the main, others, and little light is shed upon them by the jurisprudence of the long past. The old reports are not often cited in our courts now, though they sometimes are, and may be, with great advantage. More frequently, however, when cited, the reference to them is made to exhibit the counsel, rather than the law.

I well remember an incident which occurred when I was a student in a law school. I had an ambitious classmate who was studying with remarkable energy to prepare himself for entrance into the legal profession. Something intervened

which compelled his withdrawal from the school and a probable interruption of his studies for two years. Lamenting to me over his misfortune and the necessary postponement of his call to the bar, he gave as a special reason for his regret, that in his opinion all debatable legal questions would soon be settled, and nothing would be left to the lawyer but treading a beaten path, conveyancing, or a higher order of clerkship. We may smile at his want of foresight, in view of the experience of the last fifty years. Our modern books of reports exhibit a multitude and variety of questions discussed and decided far greater than ever existed in any previous equal period of legal history, and there is no reason to believe that the number will ever be less so long as general intelligence shall increase and while trade and commerce and the arts of civilized life shall continue to grow. And we have come, I think, to that point of time in the history of the world when it may be expected that the march of civilization will never again be retrograde. The forms of government may change. Public law may change. The modes of administering laws may be altered, but human progress onward and upward seems to be inevitable. In the past, it must be admitted, nations have decayed. Egyptian and Phœnician civilization has disappeared, and even Greek and Roman has become obscured. Arts have been lost, and whole peoples have been remitted from civilized to barbarous life. But the spirit of the present age is unlike that of any preceding. It is ever reaching out toward higher attainments. It avails itself of all former achievements, and makes them steps towards higher and more useful aims. This is remarkably illustrated by the progress of invention. In the museum at Venice, as elsewhere in Europe, may be found among the relics of an early period many things, rude indeed, yet conducive to human comfort and convenience, in use no doubt in a former age, but which in the later social decay have passed out of use and out of sight. Yet they are suggestive of better things. The Press has brought them to light, and the mechanical principles they involve have stimulated the inventive genius of the English people and of ours

to reproduce them in improved forms. The Patent Office at Washington is a wonderful illustration of development in the arts of civilized life. Every week there issue from it more than two hundred patents for what are pronounced by trained examiners new and useful inventions. By far the greater portion of them are patents for improvements upon discoveries and devices previously made. Many of them prove on trial to be of little worth and never go into general use, but many contribute largely to the welfare and growth of society. They affect commerce, agriculture, and all the employments in which men engage. They multiply the wants of the community, while they furnish supplies for those wants. They effect constant changes in the modes of doing business, and necessitate, therefore, modifications and changes of the laws to meet a new order of things. I mention this as an illustration of what may be expected in the future. Now, if it be considered that the art of printing has insured, and will ever insure, the preservation of what has been gained,—that there is no longer any possibility of losing any of the attendants and aids of social growth, but that their inevitable tendency must be to increase,—it may reasonably be expected that the law which protects and regulates their enjoyment will from time to time receive such modifications as the growing necessities of the community demand.

Returning from this digression, and in further exhibition of the fact that our law is a progressive science, I notice the diversity of the character of modern reports and those of the last preceding generation. Very largely they are concerned with different classes of subjects. This is true of both English and American reports. In both the old and the new there are, indeed, similar questions to be found. The construction of wills, contracts, and statutes, the enforcements of trusts, and numerous other things that might be mentioned, now engage the attention of courts as they formerly did, but there are many subjects presented at the present time of which there are no hints to be found in the decisions of courts fifty years ago. The modern growth and variety of private corpor-

ations has opened a wide field for litigation. The introduction of steam navigation, of railroads, telegraph lines and works of internal improvement—the changes made by legislation in the rights of married women, in the laws of descent, in the rules of evidence, in the forms, modes, and subjects of taxation and in the rules of practice—these, among others, are the matters that mostly engross the attention of the lawyer and require the consideration of the courts. That they involve new questions, to be solved by rules that, if they had any existence, were not called into action until recent times, must be obvious to every attentive student.

Litigation has immensely increased of late years. This might have been reasonably expected as a consequence of increasing population and wealth, and as following from the unprecedented changes that have taken place with so much rapidity, in the business of life, and in the instruments and modes by which business has come to be conducted. Very much of this litigation is, of course, over disputed facts—over issues submitted to the determination of juries. But if we look to the courts whose peculiar province it is to determine finally what are the legal rights and duties of the parties litigant, it will be found, I think, there never was a time before the present when there were so many strictly legal questions for adjudication—so many new rules to be applied, and in some cases to be devised, as there are now. There need be no fear that all legal questions will soon be settled. The highest courts of England, the Supreme Court of the United States, the supreme courts and courts of errors and appeals of the states are the tribunals in whose records we are to look, not merely to ascertain what the law is, but also to discover its growth and development. They declare finally the law that regulates every relation and transaction of life. They apply existing rules whenever their application is fitting, and in some cases where there is no existing rule they devise one adapted to the case before them, if one can be devised consonant with natural justice and not injurious in its operation upon other similar cases. They have little to do with

anything else. If there had been no changes in the law—if it had not grown pari passu with the growth and variations of social transactions—if it remained the same as it was fifty years ago, almost every important legal question must have been settled, and it would be impossible to account for the vast increase in the number of cases which appear on the records of our higher courts. I have not the means of determining how great that increase has been, though I can speak with some definiteness of the Supreme Court of the United States. I have compared the appearance docket of 1847, 1848, 1849, and 1850 with that of the last four years, and with the following result:

In 1847 the number of appeals and writs of error docketed was	65
In 1848 " " " " " "	67
In 1849 " " " " " "	70
In 1850 " " " " " "	93
Total in four years, - - - - - - - - -	295
In 1875 the number was - - - - - - - - - - - -	390
In 1876 " " " - - - - - - - - - - - -	366
In 1877 " " " - - - - - - - - - - - -	384
In 1878 " " " - - - - - - - - - - - -	415
Total, - - - - - - - - - - - -	1,555

Comparing, then, a period of four years, ending in 1850, with the four years last past, and we have the result of two hundred and ninety-five writs of error and appeals during the first period, and fifteen hundred and fifty-five during the last. I know there have been peculiar causes for this immense increase. A great war has intervened, and the legislation which followed it contributed largely to controversy in the federal courts. War, while it suspends some litigation, always leaves a foundation for its increase, and the late civil war has illustrated this in a remarkable degree, at least so far as litigation has found its way into the federal courts. But the higher courts of England and of the states exhibit an increase in the

number of cases presented for adjudication which, though not so great, is still noteworthy. The courts of error of all the larger states of the Union are burdened as never before, and they are increasingly burdened from year to year. Their calendars are crowded with cases awaiting argument to an unprecedented extent. That this is true in Pennsylvania is well known to us all. The late Chief Justice of the Supreme Court, (Judge Agnew,) recently said that during the last year of his official life, he had filed more than three hundred and thirty opinions, individual and per curiam, in addition to his other duties in the court. Another judge of the court said that during several years last past, about seven hundred cases had been annually heard, considered and decided. I think it may safely be said the business of that court is more than twice as great as it was when Gibson retired from the Chief Justiceship. It is equally true of the courts of errors of other states. In New York and Ohio, commissions have been formed to relieve the pressure upon the highest courts, but even they have proved inadequate. In Indiana, I am informed, there are now pending upon the docket of the Supreme Court fourteen hundred cases awaiting argument and decision. The pressure is not less in Illinois and in the other larger states.

Now, how, I repeat, are we to account for this immense increase? Certainly not principally by the growth of population. The cases which find their way into these courts, as I have said, are but rarely issues of fact. Those are decided finally in the lower courts. What the superior courts are called upon to consider is the law which should be applied to ascertained facts, and cases are not often removed to the higher courts when the law which must govern them is known and settled. No doubt many, and probably most, are those in which the controversy is not so much respecting the law, as it is respecting the applicability of known and recognized law to a supposed peculiar state of facts. Human affairs are constantly changing. Fresh complications incessantly arise. New elements appear from time to time in old combinations, and it is often a grave question whether the law, which was

confessedly applicable to the old, is equally applicable to the new, or whether it requires some modification. It is impossible, however, to examine the reported decisions without observing that often something more than mere modification has been required and made. Some new rule has been introduced, thereafter to be recognized as law, and applied to the transactions of life.

I pass now to notice the agencies by which the changes and development of the law have been effected. Of these there are two: direct and positive legislation, and the moulding and adopting action of the courts. Of the first, I propose to say little. The theme is too large to be fully discussed in the limits of a single address.

The changes wrought by legislative action, unlike those effected through the agency of the courts, are abrupt and sudden. Its steps always command attention. They are visible in our statute-books, described in the daily press, and constantly before the eyes of the community. They derange at once the habits and customs of the people, and not unfrequently are more far-reaching than they were intended to be. It cannot escape observation that the private law of the land has, within the last century, undergone more numerous and radical legislative changes than in any former equal period. During the present generation they have been introduced with startling rapidity. Many of these, no doubt, have been great improvements. Of others, I think it should be confessed, they were incautiously made. The active and speculative mind of the age has been unwilling to await slow processes of development, and legislatures have been increasingly ready to disturb every part of a system hallowed by the wisdom and experience of ages, and to substitute for its rules and principles others untried, and often merely experimental. The true theory of a legislative agency for legal improvement is that it should be a deliberative body. That implies caution, a just estimate of the present, and a wise forecast. Such, unhapily, is not always the character of our legislatures. Much modern legislation is crude, made without careful consideration, and

sometimes disastrous. There is an absence of proper training in our legislators. It seems to be thought by many that training is unnecessary; that nothing more is needed than honesty and ordinary intelligence. Never was there a greater mistake. Honesty is needed, and so is general intelligence, but these are not all the qualifications required for the work of improving the law. It is impossible to find any reason why wise preparation for his work is not as essential for a law-maker as it is for a judge or a legal practitioner. How can a man prudently change, modify, or enlarge the laws of a people who does not know what those laws are, what changes are needed, and does not fully understand how they can be effected? How can he safely formulate changes without clear apprehension of the phrases he uses, and without knowledge of the ordinary rules of construction? This defect of suitable training has already worked some curious and undesirable results. It has greatly increased the labor of courts, rendered obscure the true intention of the law-makers, sometimes defeated it, and even caused an abandonment of the common rules of construction. An illustration is at hand. Much affirmative legislation now takes the form of a proviso to a preceding enactment. In the construction of old statutes the province of a proviso was to except something from the operation of a prior rule. Now the rule is found in the proviso itself.

I dwell no longer upon this. Notwithstanding all just criticism that may be bestowed upon the faults in the manner of modern legislation, and in some particulars upon its substance, it remains true that it has greatly enlarged and, in many respects, improved the laws of the land. It has remedied long-standing evils, thrown new guards around private rights, abolished usages no longer consistent with the public good, created some new rights, defined those that were obscure, and in many directions has made large advances towards the attainment of perfect justice. In doing this, the work of legislation has added an immense body to the general system of private law, and opened a volume of new

legal questions, multitudes of which remain to be answered.

Among the more important statutes recently enacted, are laws to secure what are called the rights of married women (a fruitful source of litigation), laws to change radically the rules of evidence, and laws to abolish the long-standing rules of practice and introduce in its stead another system totally different. Others almost equally far-reaching might be mentioned, but I attempt no enumeration. A general reference to modern legislative changes may be found in Judge Sharswood's note, at the conclusion of the second volume of his edition of Blackstone's Commentaries. This note will be read with much interest. But the task of enumerating legal changes, either those wrought by direct and positive legislation, or introduced by any other agency, belongs to a legal historian, and it is much to be desired that some competent successor to Mr. Reeves may be found who shall continue his work down to the present age.

Of the other agency by which our law has been enlarged and improved I have more to say. I refer to the action of courts. This has been less observable, but it has been equally great. In the early period of the law it was exceedingly simple. Its rules were few, and, as I have already noticed, they related principally to real estate. It is probable they had their origin, if not mainly, at least to a far greater extent than is generally supposed, in positive enactment. We are accustomed to speak of the law as written and unwritten, distinguishing between that which is the creature of statute and those customs and social usages which have acquired the force of law. Yet there is much reason to believe many of these old customs were introduced by acts of Parliament, or positive prescriptions made when the government of the English kings was personal rather than constitutional. Very few acts of Parliament prior to the reign of Henry III have been preserved. It is almost certain, however, that many must have been enacted before that time, which, though they have been lost, gave rise to the customs that prevailed in after-times, and that were recognized by the courts as of binding obligation. It has

always been the conceded province of the courts to declare what the law is, as well as to apply it to the transactions of those subject to it, and from the beginning the judges enforced not only acts of Parliament and rules prescribed by the Crown where personal government prevailed, but they adopted and declared to be laws the social usages that had grown up, whenever in their judgment they were reasonable and conducive to the public welfare. It was thus the body of the common law commenced its course of development, and by this process it has hitherto continued to grow. Thus the early English judges built up their jurisdiction and extended the boundaries of jurisprudence, cautiously adopting as rules and enforcing these long-settled usages, rather than prescribing new rules in advance of social customs. The wisdom of such a course is manifest. The rule when enforced created no friction. It commended itself to popular approval. The decisions of the courts were not often in advance of what the community had previously adopted for itself. It must be admitted, however, that they sometimes were. Common and long-continued customs were condemned when they were believed to be unjust, or injurious to the public weal, and in some instances arbitrary rules were adopted to meet the necessities of cases in respect to which there was no usage. Not often did such action fail to meet popular approval. In this manner and by this agency it may be said a large portion of English common law has grown up. It is not the result of legislative action, but the out-growth of judicial practice and decision.

We sometimes hear complaints uttered of what is called "judge-made law." Yet it cannot be denied that it has always been a conceded power of English judges to adopt rules for decision in certain cases, and under certain limitations, when no previous rule existed, or when a previous rule could not be justly applied to the novel circumstances of the case. And it is remarkable how few have been the departures from the limitations attending this power. Courts have generally acted with extreme caution. They have applied existing rules when they could be applied without a clear perversion of justice.

They have been controlled by former decisions often when convinced that the rule asserted in them needed change. It is not against the law thus administered that the complaint is made. What must be meant by "judge-made law," when used as a term of reproach, is the adoption and enforcement of a regulation having no warrant in statute or previous decision, not required by the necessities of the case, and not in harmony with natural justice. The occasions for such a complaint have been exceedingly rare. Cases have been much more frequent in which relief has been denied to an aggrieved suitor because no law could be found to meet his case.

There has sometimes been a struggle between the judiciary of England and its Parliament, more frequently in a former age when the nobles and clergy were more the controlling power in legislation than they have been since the reign of William and Mary. While generally statutes have been conceded to be binding rules of decision, and courts have made honest efforts to enforce them according to their true spirit, instances have occured in which they have been evaded under the settled conviction that they were unpolitic and unjust. A notable one may be found in the treatment of the statute de donis, by which it was practically made of none effect. By that statute the holder of an estate tail was restrained from alienating the fee. Such was the plain purpose of the enactment. A grant to one and the heirs of his body, it was enacted, should be strictly and literally complied with. Thus it was required that the estate should certainly descend to the heir, reverting to the grantor on failure of issue at any time. Yet the courts, after considerable delay, held that the estate could be alienated and the heir and reversion could be cut off by the device of a fictitious common recovery, suffered by the tenant in tail. Thus the statute was converted into a mere prohibition of the ordinary modes of conveyance, and lost all its effect. Such an evasion of a statute would not be tolerated now, even in England, much less in this country. Yet the usages of any people may outgrow even their statutory law, and in modern times, long continued departures from the re-

quirements of legislative acts have sometimes been treated as evidence that the statutes are no longer in force, though never formally repealed.

I have spoken thus far of the development of the law by judicial adoption and enforcement of common usages, and by the application of the principles of natural justice. To such a growth there has always been a ready popular assent. It is but an expression of the popular will, a mode in which the people make laws for themselves as they are needed. The action of a legislature is indeed an expression of the will of its constituents, but it is not the only mode in which the people assert their rights and form rules for their preservation and enforcement. There is ever a silent growth proceeding concurrently with positive enactment.

I mention now other sources from which the enlargement of the law has been drawn by the adopting action of the courts. Very large drafts have been made upon the civil law derived from the Roman, the fountain of the private legal systems existing in Italy, France, Germany, and Austria. It is true that in the common-law courts, and among English lawyers, there has existed a strong prejudice against the civil law. It has never been recognized as of any authority in England. Its maxims and its rules have been contrasted unfavorably with those of the common law, and there has been an abiding reluctance to employ them in the administration of justice. Nevertheless, partly through the influence of ecclesiastics and partly from a growing necessity, the civil law has made large additions to the common law both of England and of this country. No one who has carefully read the history of the English people can have failed to observe the great influence which the church has exerted, not merely over their morals, but also over their public and private law. The early ecclesiastics were, in numerous instances, foreigners, and while the law relating to personalty was in its infancy, they were in subordination to the Church of Rome and to the Pope as its head. They were acquainted with the institutions, practice, and rules in force on the continent. It is not strange there-

fore, that the church claimed, and was accorded, jurisdiction in all matters affecting its interest, and exercised its jurisdiction in accordance with the canon laws enforced on the continent. The right of its tribunals to exclusive cognizance of the rights and duties of its ministers, was asserted, and for a time maintained, though it was at length seccessfully controverted. But jurisdiction over matters that related to religious faith was conceded to them by the common law courts, and it was exercised in accordance with the principles of the canon law. Marriage being regarded as a sacrament, the rights that grow out of it, matrimonial laws generally, and also divorce or alimony and separation came to be regulated by the same law. So testamentary dispositions, the probate of wills, and administration in cases of intestacy, were remitted to the care of the church tribunals. In this manner the canon law was grafted, in part, upon the common law, and it yet constitutes a part of the system.

This is not all the debt due to the civil law. Commerce and trade are older than the civilization of England. The usages of merchants had become settled before English trade and commerce had grown into any importance, and those usages had been recognized, and rules of commercial law had been established, before England had any commercial code. As her domestic trade and her commerce with foreign nations increased, she had no rules adapted to the nature of the complicated relations that came into existence, and it became of the highest importance that the law regulating them should be the same as that of other nations. In the civil code her judges found a system already formed, just and convenient in its working, adequate to every necessity, and they wisely adopted it. Commercial law may be said to be a graft taken from that code by English judges.

So the maritime law of the continent has, in part, become the law of England, not by force of statutes, nor because of domestic usages, but because of its adoption and enforcement by English courts.

There is still another addition to our private law which I

may not omit to notice. The whole system of equity, including its rules and practice, is a judicial creation. It had its origin, as we all know, in the court of chancery. For a long period, and generally until the reign of Henry VIII, the chancellor was an ecclesiastic. There was an occasional exception. There was one lady keeper of the great seal. She was a foreigner. It was quite to be expected, therefore, that the chancellor would be familiar with the principles of the civil law, and would make use of them in his decrees. Moreover he was appointed to be the keeper of the king's conscience, when in theory the king was the fountain of all laws, and the leading design of his appointment was avowed to be, mitigating the hardship arising in some cases from the enforcement of the general legal rules, or, as said in the old books, affording equitable relief when the law, by reason of its generality, became oppressive. Beginning thus, and clothed with such power at a time when the English kings exerted very largely a personal government, unrestrained also by rules of law, the chancellor and his successors, courts of equity, felt at liberty to administer equity according to their own ideas of what was just and humane. At first they sought principally to prevent injustice by injunction, and early equity was distinguished from law in that it sought to prevent the perpetration of a wrong, while courts of law sought to punish or supply a remedy for wrong already committed. It acted administratively or dispensively, while the laws sought only compensation or retribution. It had its own forms of proceeding, extraordinary, that is, outside of the forms of common-law actions. But the province of equity was soon enlarged, and it has continued to expand until the present day. It has become a system of social regulation, as perfect, within its limits, as is the common law itself. This development has not been the offspring of legislation. It is the result of the continued application to the complicated affairs of life of what has been deemed to be the principles of natural justice tempered by due regard to the misfortunes and frailties of men. It is the creation of judges, submitted to by legal tribunals, because it commends itself to their moral sense, and

because it has been found conducive to the highest welfare of society. It now occupies largely the attention of courts in this country, and fills our books of reports.

Such was the growth and the manner of growth of the law of England up to the time when this country was settled. I make no reference to the statutes that were enacted. Undoubtedly, they introduced changes, but, I think, far less than have been introduced by modern legislation. The principal changes, and the most important, were gradual growths, the ever-crystalizing customs of the people, recognized by the courts, or laws borrowed from foreign systems. Even Magna Charta was but an acknowledgment of existing rights, most of which had previously been asserted by the courts.

English law is the substratum of our own. What has been affirmed of that is equally true of the law of this country. In many particulars American law has undergone even greater changes than have taken place in England, but they have been wrought in a similar manner, quite as much by evolution through the agency of judges as by positive enactment. The American Revolution was an epoch in our legal history. Prior to its occurrence the jurists of this country were necessarily followers of English judges. The decisions of the courts at Westminster were binding authority here, and many English statutes had the same force on this side of the ocean as they had in the country where they were made. But the severance of the colonies from the mother country introduced a new order of things. It necessitated changes not only in governmental institutions and in the public law, but equally in the private law that regulates the relations of individuals to each other. The common law of England was not, in all respects, suited to our new institutions, and in many particulars it was not fitted to the peculiar circumstances of our people. In the nature of things, no system of private laws is the best possible for every country. It needs adaption to the geographical situation, the circumstances and occupations of those to be controlled by it, as well as to the structure of their government. This was fully appreciated by the judges of our courts, as well as by our legis-

lators, when as a people we came to act for ourselves. Our novel circumstances called, not for an abandonment, but for very considerable modifications of the English law. Feudal tenures never had any large place on this continent. Changes in the law of conveyancing were, therefore, natural and inevitable. They had been made in many particulars before the Revolution. The law of descent was unsuited to the best interests of a new country like ours. There was no room for general ecclesiastical law here. Even the law of admiralty required extension. Many English statutes were ill adapted to our condition. Some of the needed changes were effected by direct legislation; many others were the work of the wise judges who presided in our courts. With the uiversal assent of our people, they moulded English law to suit our altered circumstances. They repudiated principles acknowledged in the law of the mother country when they could not be applied here without inconvenience and injustice. They held in force many English statutes as a part of our common law, and denied the authority of others deemed not conducive to the public welfare. It is impossible to examine these judicial modifications of a venerable system, made to fit it to the wants of a great and growing people, without admiration of the wisdom with which they were made. It was in this work that many of the honored judges of the past won a lasting fame. Pennsylvania lawyers will never cease to admire the labors in this direction of Chief Justice Tilghman. Other states have had their Tilghmans too.

I have already alluded to that growth of our law which has been caused by the social advances made in modern times, such as the progress of invention, the introduction of new arts and conveniences, and the consequent changes in the modes of doing business. To meet the altered and frequently shifting complications resulting from these, and to find a rule justly and reasonably applicable to them, is and always has been acknowledged to be one of the gravest duties of our courts. It has been met, so far as possible, by applying the principles of past decisions, or principles analogous to them, and it has been

only when those could not be found, when the subject was entirely new, that the courts have felt justified in devising a rule for the future, adapted in their wise judgment, and consonant with natural justice. Even of this, I think, it may be said, it has generally been done with extreme caution. It is always attended with danger that the new rule may work hardship and injustice when applied to past transactions. The community may justly demand that what has been done or left undone in the past shall be judged by the law that existed at the time, by what was then known or might have been known. No tyranny is greater than that of unknown or retrospective or ex-post-facto law. Hence statutes are always presumed, if possible, as intended to act only prospectively. When they become a rule of action is always known, and there is little danger and no injustice in applying them to business done, or relations arising after they come in force. But the law which comes into force only by its recognition in judicial tribunals, unless announced with limitations and guards, may have been an unknown rule before its announcement, and may operate harshly in some cases. This is a danger that has always attended the development of the unwritten law, and, in the nature of things, it must always attend it. And yet such a development is inevitable, and must continue to be so, until human progress shall cease, and civil society shall become stagnant.

In this country we have restrictions upon the institution of unwritten as well as written law that do not exist to the same extent in any other. We have formulated constitutions, containing limitations of power no matter by whom attempted to be exercised. These limitations environ alike legislatures and courts. They deny effect to some possible customs of the people, however long continued. The constitutions contained declarations of rights, utterances of natural justice, which are regarded as lying at the foundation of civil society, and which no one dreams can ever be transgressed. Even a statute which infringes any of these rights, falls dead. Though having the form of law, it is not law, and the courts whose province it is to declare what the law is, must deny effect to it. In reference to

the careless legislation of modern times there is to be found, I think, an increasing number of instances in which the judiciary of the country has been required to exercise this power of enforcing constitutional limitations. But the private rights and duties which have a constitutional sanction are alike protected against invasion by the courts. Rules of action or duty that are transgressive of such rights, it is beyond the power of judges to recognize or enforce.

From what I have said it will be seen that a very large portion of the law which defines, regulates, controls, and preserves private rights and duties is not the creation of what is usually denominated the law-making power of the country. That power does not reside wholly in its legislative assemblies. Our constitutions, indeed, declare that the legislative power of the state shall be vested in bodies, distinct from the courts, and especially intrusted with the work of making laws for the community. They attempt to distribute all governmental authority, allotting to one department the legislative, to another the judicial, and to a third the executive. But what is meant by the judicial? Certainly not merely the power to declare and enforce the positive law enacted by the legislative department. Certainly there is not excluded from it all power to modify and adapt existing rules to the ever-changing complications of society, and even in some cases to devise new rules for new contingencies. This is a power always claimed and always exerted, from the earliest period of our judicial history. Through its exercise the whole growth and development of the common law has been effected. The power was recognized as belonging to the judiciary when the earliest of our constitutions were framed, and it may fairly be assumed that when they were adopted it was the purpose of their framers to invest the judicial department with the powers and duties which were at the time, and which had ever before been recognized as belonging to it. And such a mode of legal development, lodged somewhere outside of strictly legislative intervention, is a necessary attendant of all advancing civilization: The Roman prætors exercised it. None of the prominent nations of the earth have ever been able to

dispense with it. No code has ever been framed, none ever can be, comprehensive enough to embrace all the law of a people. No human foresight was ever sufficient to make provision for every possible contingency. No legislature ever has been, none ever can be, active and vigilant enough to make its statutes cover the whole field of the common law, or to provide in advance for the occurrence of unforeseen and often suddenly-arising business complications. Codes have been framed in several great nations, and they are still in force. In 1794 one went into effect in Prussia. In 1804 the Code Napoleon was proclaimed in France, and in 1811 the Austrian Code became the law of that empire. All these codes were attempts to frame a complete system, to embrace the whole private law. They were all framed in view of the accumulated wisdom of the Roman law, and they drew very largely from it. But they have all been found imperfect. Monuments of wisdom and far-sightedness as they were when framed, they have not unaided been found sufficient to meet the need of later years, and they have received constant accretions by the same processes, and through the same agencies as those by which our common law has been developed. To use the language of another, "If in all nations a great deal of law has sprung up, and found recognition in the practice of courts, without the intervention of a legislature, this fact alone is enough to prove that a people has other means of law-making besides the action of a legislative body. It seems to me," he adds, "impossible to frame a theory which shall be in harmony with all the facts, unless by recognizing in the courts, in judicial practice, a means by which the law-making power of a people is to some extent exercised."

I have thus endeavored to direct your attention to the fact illustrated in all its history, that our municipal law ever has been and still is in process of development, that its ramifications are constantly being extended, and that it presents changed aspects with every succeeding generation. I have spoken also of the agency by which these changes and expansions have been effected. They are both still in action, and necessarily so. It is plain that if legislation had been the only

agent for that legal development which the advancing interests of the community have required, it would have been inadequate to meet them. But working concurrently with the moulding action of the judiciary, the result has been a system which well preserves private rights, enforces justice, and conduces in an eminent degree to the good order and prosperity of the entire community—a system which may well claim to be the noblest work of human device the world has seen.

I do not say there are not still imperfections in the law. I do not maintain that all legal development made by the courts or by legislatures has been the wisest possible. But I do claim that in the main, steady advancement has been made toward perfection; that the law of the land is now more complete and adequate to all the wants of society than ever before, and that having within itself the elements and agencies for growth, it may be trusted to continue adequate in all time to come, ever growing with the growth and advancement of our people, and ever tending toward the attainment of perfect justice.

Perhaps I have already detained you too long.

I cannot conclude, however, without one further observation, addressed principally to those who are in preparation for the legal profession. From what I have said it must be evident that to become an accomplished lawyer is no easy task. It was remarked by a distinguished writer, "The profession of the law is that of all others, which imposes the most extensive obligations upon those who have had the confidence to make choice of it." These obligations grow with the growth of the law. Whatever they may have been to the great men who have been our predecessors in the profession, they are greater now. There is a far wider field now to be explored, a field the boundaries of which are enlarged from year to year. The knowledge which made the lawyers of the past generation eminent is insufficient for the present. It is no longer the "lucubrationes viginti annorum," to which we are invited. It is to the hard study, the unintermitted hard study of a life-time. There are no lengthy vacations possible. Whoever stops to rest will find he has been left behind. The profession has many members

who have turned aside for politics or other business, only for three or four years, and have found themselves at the end grown rusty, with past acquisitions faded, and with the law advaneed beyond them. Rarely, if ever, have they recovered the lost ground. It is well, therefore, for those who aspire to professional eminence, to count the cost at the beginning, and go forward with a resolute determination to pay the price. Such a resolve earried out has its compensations, not merely in the honor and usefulness secured, but in the enjoyment whieh constantly increasing knowledge always brings in its train.

LAW DEPARTMENT.

CLASS OF OCTOBER TERM, 1879.

Name.	*Residence.*	*Preceptor.*
John Adams,	Philadelphia,	Admitted.
Charles A. Allison,	Mifflintown, Pa.	J. H. Heverin.
James B. Anderson, Jr.	Philadelphia,	Hon. F. C. Brewster.
Edwin S. Balch,	"	W. H. Rawle.
Albert J. Bamberger,	"	T. J. Diehl.
Charles H. Bannard,	Salem. N. J.	M. P. Gray.
Robert M. Barber,	Philadelphia,	J. M. Pile.
Henry B. Bartow,	Bristol, Pa.	G. C. Purves.
Edward Biddle,	Philadelphia,	J. C. Bullitt.
Charles C. Binney,	"	W. H. Rawle.
William S. Blight, Jr.	"	Judge Penrose.
Edward P. Bliss,	"	P. K. Erdman.
Charles L. Bourguignon,	"	W. H. Staake.
Henry M. Boyd,	"	
M. William Bradley,	"	W. F. Johnson.
Winfield S. Brandt,	"	Read & Pettit.
Frederick L. Breitinger,	"	C. Davis.
J. Douglass Brown, Jr.	"	F. Rawle.
Joseph T. Bunting,	"	E. Hopper.
Lewis D. Campbell,	Johnstown, Pa.	J. L. Jones.
John D. Carlile,	Philadelphia,	C. Carver.
Richard S. Child, Jr.	"	G. Harding.
Alfred G. Clay,	"	J. A. Clay.
Robert Coleman,	"	
Edward G. Comingo,	Pittsburgh,	H. G. Ward.
Samuel W. Cooper,	Philadelphia,	S. Wagner, Jr.

Name.	*Residence.*	*Preceptor.*
William K. Copenhaver,	McAllisterville,	C. Gibbons, Jr.
James C. Corry,	Philadelphia.	P. McCall.
J. Parker Crittenden,	"	S. B. Huey.
Henry T. Dechert,	"	H. M. Dechert.
William S. Divine,	"	S. B. Huey.
Perit Dulles,	"	W. H. Browne.
William Dulles, Jr.	"	S. B. Huey.
Charles B. Earley,	Ridgway, Pa.	Rufus Lucore.
David C. Edwards,	Philadelphia.	W. W. Carr.
Thomas A. Edwards,	"	R. L. Ashhurst.
Amos H. Evans,	Cecil Co., Md.	C. M. Swain.
Thomas A. Fahy,	Philadelphia.	E. R. Worrell.
Humboldt Garber,	"	T. J. Ashton.
George J. Garde,	"	Jas. Alcorn.
Henry E. Garsed,	"	R. B. Bayly.
Walter S. Gibson,	"	J. L. Jones.
David A. Gourick,	"	W. A. Redding.
Joseph L. Greenwald,	"	W. J. Budd.
John A. Guiher,	Waynesburg.	Wyly & Buchanan.
Henry W. Hall,	Philadelphia.	H. C. Thompson.
Walter F. Hall,	"	E. C. Mitchell.
Fred. W. Hammett,	"	H. K. Fox.
C. Edgar Haupt,	"	R. M. Schick.
Samuel H. Heilner,	"	D. J. Myers.
J. Burke Hendry,	"	E. C. Mitchell.
Daniel Holsman,	"	McVeagh & Bispham.
Henry M. Hoyt, Jr.	Harrisburg,	McVeagh & Bispham.
Bertram Hughes,	Philadelphia,	S. B. Huey.
Frank H. Illman,	"	G. E. B. Conrow.
Henry A. Ingram,	"	F. Rawle.
Baker Johnson,	"	G. L. Crawford.
Andrew T. Kay,	"	A. Thackara.
Clarence Kennedy,	"	Gendell & Reeves.
Joseph J. Knox,	"	Aubrey H. Smith.
Joseph F. Lamorelle,	"	James Parsons.
Lucius S. Landreth,	"	McVeagh & Bispham.
James T. Lang,	"	M. H. Brown.
A. Nelson Lewis,	"	V. Guillou.
Francis A. Lewis, Jr.	"	McVeagh & Bispham.

Name.	*Residence.*	*Preceptor.*
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Thomas K. Longstreth,	"	Admitted.
William H. R. Lukens,	"	L. D. Vail.
Hugh J. McCartney,	"	J. M. West.
James McCartney,	"	J. P. Klinges.
Edward G. McCollin,	"	J. R. Rhoads.
Albert W. McConnell,	Pittsburgh,	M. H. Brown.
Owen J. McDonald,	Philadelphia,	P. E. Carroll.
Edward W. Magill,	Chester, Pa.	J. Harvey.
James Marshall,	Philadelphia,	W. W. Wiltbank.
William C. Mayne,	"	W. B. Mann.
Charles Mecum,	Salem, N. J.	M. H. Stratton.
R. Taylor Middleton,	Philadelphia,	J. C. Longstreth.
William P. Mifflin,	"	G. W. Biddle.
James L. Miles,	"	Harold Mann.
Alfred S. Miller,	Spring City, Pa.	I. D. Yocum.
Charles R. Miller,	Philadelphia,	J. S. Price.
E. Augustus Miller,	"	H. K. Fox.
E. Spencer Miller,	"	Gendell & Reeves.
Philippus W. Miller,	Frankford, Pa.	E. C. Mitchell.
Arthur Moore,	Philadelphia,	A. Moore.
Henry Myers, Jr.		
William L. Nevin,	Philadelphia,	S. B. Huey.
Alex. H. Nichols,	"	Kneass & Ransford.
Walter H. Nixon,	"	Sharp & Alleman.
Arthur J. Peck,	Atlanta, Ga.	J. W. Patton.
Walton Pennewill,	Philadelphia,	E. P. Smithers.
Benjamin F. Perkins,	"	C. F. Warwick.
George S. Philler,	"	R. L. Ashhurst.
Russel Price,	"	F. F. Brightly.
Hugo A. Rennert,	"	R. L. Ashhurst.
William Renneyson,	Norristown,	Read & Pettit.
Eugene W. Richardson,	Philadelphia,	T. J. Diehl.
William Rickey,	"	J. M. Moyer.
John J. S. Rodgers,	"	W. E. Littleton.
George Rogers.	"	J. S. Price.
Augustus J. Rudderow,	"	J. M. Collins.
Millard F. Scheide,	"	W. B Mitchell.
Arthur H. Scherer,	"	D. R. Patterson.

Name.	*Residence.*	*Preceptor.*
John Scott, Jr.	Philadelphia,	McVeagh & Bispham.
J. Walter Screven,	"	M. Arnold.
Leedom Sharp,	"	E. C. Mitchell.
William H. Shoemaker,	"	
Fred. C. Simon,	"	T. L. Vanderslice.
Jacob Singer,	"	McVeagh & Bispham.
G. Taylor Smith,	"	R. H. Hinckley.
John Sparhawk, Jr.	"	R. N. Willson.
William H. Stetler,	"	Gendell & Reeves.
William M. Stewart, Jr.	"	R. L. Ashhurst.
Frank G. Taylor,	"	J. A. Clark.
Harry S. Taylor,	"	A. S. L. Shields.
Oscar B. Teller,	"	H. K. Fox.
Francis H. Thole,	"	H. Mann.
F. Thomas Tobin,	San Francisco,	B. H. Brewster.
Harry M. Tracy,	Conshocken, Pa.	D. Dougherty.
Francis S. Turner,	Elizabeth, N. J.	O. A. Law.
Thomas P. Twibill,	Philadelphia,	W. Gorman.
Henry W. Watson,	Langhorne, Pa.	F. C. Brewster.
Francis Lincoln Wayland,	Philadelphia,	E. C. Mitchell.
Jay G. Weiser,	Mifflintown, Pa.	R. Vaux.
Joseph V. West,	Philadelphia,	Admitted.
Richard A. Whiley,	"	D. M. Fox.
Upton H. White,	"	E. C. Mitchell.
Henry C. Whitlock,	Camden, N. J.	E. C. Mitchell.
George W. Wickersham,	Philadelphia,	R. H. McGrath.
Charles F. Wignall,	"	C. M. Hillman.
Carroll R. Williams,	"	A. Moore.
Robert J. Williams,	"	T. J. Ashton.
William G. Wise,	"	Read & Pettit.
J. Willis Witherop,	Titusville, Pa.	F. Swayne.
LeRoy J. Wolfe,	York, Pa.	W. H. Kain.
Harry B. Yerger,	Philadelphia.	W. A Husband.
George H. Zeigler,	"	J. M. West.